Sharma Kumari a/p Oam Parkash v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 41–47 OF 2000
ABDUL WAHAB J
18 SEPTEMBER 2000

Civil Procedure *— Affidavits — Jurat — Whether defective — No title to action immediately before jurat, whether defective — Whether affidavits receivable in civil suit — Whether affidavit could only be used with leave of court — Whether affidavit was authorized by law to be received as evidence under s 199 Penal Code — Rules of the High Court 1980 O 41 rr 1(7), 1(8), 4, O 49 r 9 & Form 78*

Criminal Law *— Giving of false evidence — Accused made false statement in affidavit that she was not person described in action as defendant — 'Authorized by law to receive into evidence', whether include defective affidavits filed without leave of court — Mitigation, whether any — Penal Code ss 193 &199*

The appellant was convicted by the magistrate's court on two charges under s 199 read with the first limb of s 193 of the Penal Code (Act 574) for making false statement in para (2) of two affidavits (P8 and P9) filed in Civil Suit No S2–22–594–97 to the following effect: 'I affirm the affidavit herein without prejudice to raise objections to the fact I am not the person described in the action herein as the defendant'. The appellant was sentenced to three years' imprisonment on each charge, both sentences to run concurrently. The appellant appealed against the conviction and sentence. The grounds relied upon in the appeal against conviction were: (i) the affidavits were not receivable in the civil suit because there was a defect in the affidavits for not complying with O 41 rr 1(7) and 1(8) of the Rules of the High Court 1980 ('the RHC') in that the jurat in the affidavits did not contain the title as in the action. It was also submitted that the affidavit did not comply with O 49 r 9(2) of the RHC in that the affidavit was not indorsed with a note showing the date of affirmation and of filing; (ii) s 261 of the Criminal Procedure Code ('the CPC') had not been complied with; and (iii) the magistrate never evaluated all of the evidence as required by s 173(m) of the CPC before arriving at a just decision. The grounds relied upon in the appeal against sentence were: (i) the magistrate had pronounced a manifestly excessive sentence which failed to consider the mitigating factors advanced in the appellant's behalf; and (ii) the magistrate passed a sentence that was manifestly excessive when considered with other comparable cases.

Held, dismissing the appeal:

(1) Order 41 of the RHC refers to affidavits generally, and not to jurats alone. Thus it would be redundant to put the 'title as in action' immediately before the jurat since the title is already contained at the beginning of the affidavit. The words '(Title as in

A action)' in Form 78 refer to the title in the affidavit and the RHC does not intend that the title of the affidavit should appear before the jurat. Therefore, there was no defect in the affidavits of the appellant in this case (see pp 801F-G, 802B).

(2) Order 49 r 9 does not provide that the affidavit cannot be filed or used. The rule provides it may not be filed or used without leave of the court. In other words, the defect does not render the affidavit to be incapable of being used. The affidavits in this case were each intended to be used as an affidavit and affirmed as an affidavit by the deponent. It was submitted for filing to the registry of the High Court. It was received for filing by the registry. It was clear that leave for filing was given or deemed to be given by the court since without such leave it would not have been accepted for filing (see p 802E–F).

(3) The onus of objection, if made upon the affidavits, is upon the other party. It is a perversion and abuse of the process of the court that the party filing the irregular affidavit be allowed to object upon the admissibility and use of that affidavit to escape from any liability it is exposed to by the said affidavit. There was nothing in the evidence that the other party in the civil suit had objected to the filing and use of the impugned affidavits containing the statement that was the subject of the charges against the appellant. It was accepted that the civil suit was heard and concluded (see p 803E–G).

(4) The sub-argument that the affidavits could only be used with the leave of the court ignores the fact that O 41 r 4 is not confined to the use of a defective affidavit, but encompasses the filing of it. Similarly, for the argument to succeed, one must confine the reading of s 199 of the Penal Code to the use of it. That however fails to recognize that s 199 applies also to 'authorized by law to receive as evidence ...'. Clearly it was not challenged that the registry was authorized to receive the affidavit when it was filed or that O 1 r 4 itself authorizes rather than prevents the court from receiving the affidavit as evidence of the facts it asserts by authorizing the court to give leave. The sub-argument based on absence of leave therefore did not stand scrutiny (see pp 803I–804B).

(5) The accused, in making a demand under s 261 of the CPC should give reasons indicating material prejudice if the demand is refused. The demand under s 261 is not a peremptory demand, but that the applicant must show that the accused had been materially prejudiced by the refusal. In the present case, there was no submission made specifically under this ground to show any material prejudice to the accused, be it before the magistrate or this court (see p 806C–D).

(6) The magistrate had explained her reasoning in her ground of decision. The effect of the defence evidence was clearly

considered by the magistrate. It was absolutely clear in her finding that she had found that the prosecution had proved its case beyond reasonable doubt as required by s 173(m) of the Code. The court was satisfied from the judgment of the magistrate that it was sufficiently explanatory in the circumstances of the nature of the defence evidence adduced and that her findings were in accordance with the law. There was nothing in the evidence that was contrary to her finding as to suggest she had not considered all of the evidence before making her conclusions (see pp 807I, 808D, 819H–I).

(7) It was clear that para (2) in P8 and P9 meant not only she is not the person as described or named in the action but she specifically reserved the right to object on that ground. The specific reservation following on the statement she was not Sharma Kumari Shukla shows that the statement she was not Sharma Kumari Shukla was totally material to the object, which was to reserve the right to object on that ground. In the light of evidence, the inference was irresistible that the appellant was also known as Sharma Kumari Shukla. It was clear that para (2) of P8 and P9, in their plain and natural meaning, that she was not the person described as Sharma Kumari Shukla were false statement (see p 814D–H).

(8) It was obvious that the appellant was making a statement in respect of a matter she knew directly: whether or not she had used the name Sharma Kumari Shukla as her name. It was not a matter where she was relying upon the opinion or advice of others. It was in respect of her own name. The clear inference was that she knew that it was not true that Sharma Kumari Shukla was not her name. It was therefore a deliberate false statement. Even if it was a reckless statement, s 199 would apply (see p 815A–B).

(9) The appellant's testimony that her intention was to point out that her official or formal name is Sharma Kumari a/p Oam Parkash cannot stand in the face of the plain and natural meaning of the words and was contradicted by the fact that she reserved the right to object on that ground. If the intention was to correct an error, there was no ground for objection but for correction (see p 815C).

(10) There were no real mitigation factors in this case relating directly to the offence once the defence, which relied entirely upon lack of mens rea was rejected. The humanitarian reasons were overshadowed by the clear deliberateness of the offence in this case. At the time of the making of the affidavits, the appellant reserved the right to object. That ultimately she did not object was immaterial as far as the offence was concerned, and in the proceedings she conceded through counsel she was also known as Sharma Kumari Shukla only reduced the ultimate seriousness of

her offence. On the other hand, in reserving the right to object, it required the other party to incur the inconvenience of preparing to prove if necessary she was also known as Sharma Kumari Shukla (see p 823A–C).

(11) Maintaining the same grounds in mitigation after the grounds had been rejected in her defence in the appeal against conviction displayed contumaciousness stressed by the fact no reference to remorse or contrition was made in the appeal before this court. Even accepting that these aggravating factors did not outweigh the mitigating factors, the fact remains that the mitigating factors themselves in this case did not outweigh the aggravating factors that included a previous conviction, and on balance cannot contribute to any substantial reduction of sentence. Even adopting the lower starting point, the term of imprisonment would be $3^1/_2$ years. The sentence of three years imprisonment by the magistrate could not be said to be manifestly inadequate and certainly not manifestly excessive in the circumstances (see p 824E–G).

[Bahasa Malaysia summary

Perayu telah disabitkan oleh mahkamah majistret untuk dua pertuduhan di bawah s 199 dibaca bersama dengan bahagian pertama s 193 Kanun Keseksaan (Bab 45 NMB) kerana membuat kenyataan palsu di dalam perenggan (2) dua afidavit (P8 dan P9) yang difailkan di dalam Guaman Sivil No S2–22–594–97 dengan kesan berikut: 'Saya mengesahkan afidavit berikut di sini tanpa prejudis untuk membangkitkan bantahan-bantahan bahawa saya bukanlah orang yang dinyatakan sebagai defendan di dalam tindakan ini'. Perayu telah dihukum penjara tiga tahun untuk setiap pertuduhan, kedua-dua hukuman akan berjalan serentak. Perayu merayu terhadap sabitan dan hukuman. Alasan-alasan yang digantung harap di dalam rayuan terhadap sabitan adalah: (i) afidavit-afidavit tersebut tidak boleh diterima di dalam tindakan sivil kerana terdapat kecacatan di dalam afidavit-afidavit kerana tidak mematuhi dengan A 41 kk 1(7) dan 1(8) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') di mana jurat di dalam afidavit-afidavit tidak mengandungi tajuk seperti di dalam tindakan. Juga dihujahkan bahawa afidavit tersebut tidak mematuhi A 49 k 9(2) KMT di mana afidavit tidak diindorskan dengan nota menunjukkan tarikh ia diikrarkan dan difailkan; (ii) s 261 Kanun Acara Jenayah ('KAJ') belum lagi dipatuhi; dan (iii) majistret tidak menilai semua keterangan seperti yang diperlukan oleh s 173(m) KAJ sebelum mencapai keputusan yang adil. Alasan-alasan yang digantung harap di dalam rayuan terhadap hukuman adalah: (i) majistret telah memberikan keputusan yang jelas melampau yang gagal mempertimbangkan faktor-faktor yang diutarakan bagi pihak perayu; dan (ii) majistret telah menjatuhkan hukuman yang secara jelas melampau apabila dipertimbangkan dengan kes lain yang agak sama.

Diputuskan, menolak rayuan tersebut: A

(1) Aturan 41 KMT merujuk kepada afidavit secara umum, dan bukan jurat sahaja. Oleh itu, adalah tidak diperlukan untuk meletakkan 'tajuk seperti dalam tindakan' sejurus sebelum jurat kerana tajuk telah pun diletakkan di bahagian awal afidavit tersebut. Perkataan '(Tajuk seperti di dalam tindakan)' di dalam B Borang 78 merujuk kepada tajuk di dalam afidavit dan KMT tidak berniat bahawa tajuk afidavit tersebut patut dinyatakan sebelum jurat. Oleh itu, tiada kecacatan di dalam afidavit perayu di dalam kes ini (lihat ms 801F–G, 802B).

(2) Aturan 49 k 9 tidak memperuntukkan bahawa afidavit tersebut C tidak boleh difailkan atau digunakan. Peraturan tersebut memperuntukkan bahawa ia tidak boleh difailkan atau digunakan tanpa kebenaran mahkamah. Di dalam perkataan lain, kecatatan tersebut tidak menjadikan afidavit tersebut tidak dapat digunakan lagi. Afidavit-afidavit di dalam kes ini diniatkan untuk digunakan sebagai afidavit dan diikrarkan sebagai afidavit oleh deponen. Ia D telah diserahkan untuk pemfailan di bahagian pendaftaran Mahkamah Tinggi. Ia telah diterima untuk pemfailan oleh pendaftar. Adalah jelas bahawa kebenaran untuk memfail telah diberikan atau dianggap diberikan oleh mahkamah kerana tanpa kebenaran sedemikian, ia tidak akan diterima untuk difailkan E (lihat ms 802E–F).

(3) Beban bantahan, jika dibuat terhadap afidavit-afidavit, adalah di atas pihak yang lain. Adalah suatu penyimpangan dan penyalahgunaan proses mahkamah bahawa pihak yang memfailkan afidavit yang tidak teratur dibenarkan untuk membantah atas kebolehterimaan dan penggunaan afidavit F tersebut untuk melepaskan diri dari sebarang tanggungan yang ia telah dedahkan melalui afidavit tersebut. Tiada apa-apa di dalam keterangan bahawa pihak yang lain di dalam guaman sivil telah membantah kepada pemfailan dan penggunaan afidavit yang dipersoalkan yang mengandungi kenyataan yang merupakan subjek pertuduhan terhadap perayu-perayu. Ia adalah diterima G bahawa guaman sivil telah didengar dan disimpulkan (lihat ms 803E–G).

(4) Hujahan kecil bahawa afidavit-afidavit hanya boleh digunakan dengan kebenaran mahkamah mengetepikan fakta bahawa A 41 k 4 tidak terbatas kepada penggunaan afidavit yang defektif, tetapi H juga meliputi pemfailannya. Pada masa yang sama, bagi hujahan tersebut untuk berjaya, seseorang mestilah membataskan pembacaan s 199 Kanun Keseksaan kepada penggunaannya. Namun ia gagal untuk mengiktirafkan bahawa s 199 juga terpakai kepada 'diberikuasa oleh undang-undang untuk menerima sebagai keterangan ...'. Jelas adalah tidak dicabar bahawa pihak I pendaftar diberikuasa untuk menerima afidavit tersebut apabila ia difailkan atau bahawa A 1 k 4 itu sendiri memberikuasa dan

bukannya menghalang mahkamah untuk menerima afidavit tersebut sebagai keterangan fakta-fakta yang ia tegaskan dengan memberikuasa kepada mahkamah untuk memberikan kebenaran. Hujahan kecil berdasarkan ketiadaan kebenaran dengan itu tidak dapat diterima selepas diteliti (lihat ms 803I–804B).

(5) Tertuduh, di dalam membuat tuntutan di bawah s 261 KAJ sepatutnya memberikan alasan-alasan menunjukkan prejudis secara material jika tuntutan tersebut ditolak. Permintaan di bawah s 261 bukanlah permintaan muktamad, tetapi bahawa permohonan mestilah menunjukkan bahawa tertuduh telah diprejudis secara material oleh penolakan tersebut. Di dalam kes ini, tiada hujahan yang dibuat secara spesifik atas alasan ini untuk menunjukkan sebarang prejudis secara material terhadap tertuduh, tidak kira di hadapan majistret atau mahkamah ini (lihat ms 806C–D).

(6) Majistret telah menjelaskan sebab-sebab di dalam alasan-alasan keputusannya. Kesan keterangan pembelaan dengan jelas dipertimbangkan oleh majistret. Adalah jelas di dalam penemuannya bahawa beliau mendapati pihak pendakwaan telah membuktikan kesnya sehingga tiada keraguan munasabah seperti yang diperlukan s 173(m) Kanun tersebut. Mahkamah berpuas hati daripada penghakiman majistret bahawa penghakiman tesebut telah secara memadai memberi penjelasan secukupnya mengenai bentuk keterangan pembelaan yang dikemukakan dan bahawa penemuannya adalah menurut undang-undang. Tiada apa-apa di dalam keterangan yang bercanggah dengan penemuannya untuk mencadangkan bahawa beliau tidak mempertimbangkan semua keterangan-keterangan sebelum mencapai kesimpulannya (lihat ms 807I, 808D, 819H–I).

(7) Adalah jelas bahawa perenggan (2) di dalam P8 dan P9 bukan saja bermaksud beliau bukanlah orang yang digambarkan atau dinyatakan di dalam tindakan tersebut tetapi beliau menyimpan hak secara khusus untuk membantah atas alasan tersebut. Pengekalan hak spesifik tersebut berikutan kenyataan bahawa beliau bukanlah Sharma Kumari Shukla menunjukkan bahawa kenyataan bahawa beliau bukanlah Sharma Kumari Shukla adalah material bagi tujuan tersebut, yang mengekalkan hak untuk membantah di atas alasan tersebut. Memandangkan keterangan tersebut, inferens adalah terlalu kuat bahawa perayu juga dikenali sebagai Sharma Kumari Shukla. Adalah jelas bahawa perenggan 2 P8 dan P9, di dalam maksud biasa dan semulajadinya, bahawa beliau bukanlah orang yang digambarkan sebagai Sharma Kumari Shukla adalah kenyataan palsu (lihat ms 814D–H).

(8) Adalah jelas bahawa perayu membuat kenyataan berkenaan dengan perkara yang beliau tahu secara terus; sama ada atau tidak beliau menggunakan nama Sharma Kumari Shukla sebagai

namanya. Ia bukanlah mengenai perkara dari mana beliau bergantung kepada pendapat dan nasihat orang lain. Ia adalah berkenaan dengan namanya sendiri. Inferens yang jelas adalah bahawa beliau tahu bahawa bukanlah benar bahawa Sharma Kumari Shukla bukanlah namanya. Dengan itu, ia adalah kenyataan palsu yang disengajakan. Walau sekalipun ia adalah kenyataan yang silap, s 199 akan terpakai (lihat ms 815A–B).

(9) Keterangan perayu bahawa niatnya adalah untuk menunjukkan bahawa nama rasmi atau formalnya adalah Sharma Kumari a/p Oam Parkash tidak boleh bertahan memandangkan maksud biasa dan semulajadi perkataan-perkataan tersebut dan disangkal oleh fakta bahawa beliau mempunyai hak untuk membantah di atas alasan tersebut. Jika niat adalah untuk membetulkan suatu kesilapan, tiada alasan untuk membantah tetapi untuk membetulkan (lihat ms 815C).

(10) Tiada faktor peringanan yang sebenar di dalam kes ini yang berkaitan secara terus kepada kesalahan tersebut selepas pembelaan, yang bergantung sepenuhnya kepada kekurangan mens rea, ditolak. Sebab-sebab perikemanusiaan telah dibayangi oleh kesalahan yang jelas disengajakan di dalam kes ini. Semasa membuat afidavit-afidavit tersebut, perayu mempunyai hak untuk membantah. Bahawa akhirnya beliau tidak membantah adalah tidak material sejauh kesalahan tersebut adalah berkenaan, dan di dalam prosiding-prosiding beliau bersetuju melalui peguamnya bahawa beliau yang juga dikenali sebagai Sharma Kumari Shukla hanya mengurangkan darjah keseriusan kesalahannya. Sebaliknya, di dalam menyimpan haknya untuk membantah, ia mengakibatkan pihak yang lain mengalami kesusahan untuk bersedia untuk membuktikan jika perlu beliau juga dikenali sebagai Sharma Kumari Shukla (lihat ms 823A–C).

(11) Mengekalkan alasan-alasan yang sama semasa hujahan hukuman ringan selepas alasan-alasan tersebut ditolak di dalam pembelaannya di dalam rayuan terhadap sabitan menunjukkan sifat degil yang ditekankan oleh fakta bahawa tiada sifat-sifat kekesalan telah dibuat semasa rayuan di hadapan mahkamah. Walau sekalipun menerima faktor-faktor buruk ini bukanlah jauh lebih penting daripada faktor-faktor peringanan, hakikat adalah bahawa faktor-faktor peringanan itu sendiri bukanlah lebih penting daripada faktor-faktor buruk itu sendiri yang termasuk sabitan yang terdahulu, dan di atas imbangan tidak boleh menyumbang kepada sebarang pengurangan hukuman yang banyak. Walaupun menerima tempoh yang lebih pendek, tempoh pemenjaraan adalah $3^1/_2$ tahun. Hukuman tiga tahun penjara oleh majistret tidak boleh dikatakan sebagai secara jelas tidak mencukupi dan sudah tentu bukanlah jelas melampau di dalam keadaan-keadaan tersebut (lihat ms 824E–G).]

A **Notes**

For cases on affidavits generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 219–293.

For cases on giving false evidence generally, see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1105–1127 and 1131–1133.

B

Cases referred to

Balasingham v PP [1959] MLJ 193 (refd)
Bhandulananda Jayatilake v PP [1982] 1 MLJ 83 (refd)
Chelliah v PP [1941] 1 MLJ 17 (refd)
C *Christopher Khoo Ewe Cheng v PP* [1998] 3 MLJ 881 (refd)
DP Vijandran v PP [1999] 1 MLJ 385 (refd)
Han Euu Tiam v Phang Kui Fatt & Ors [1999] 4 CLJ 395 (refd)
Jaggi MS v Registrar, High Court of Orissa [1983] Cri LJ 1527 (refd)
Junaidi bin Abdullah v PP [1993] 3 MLJ 217 (refd)
Kesavan Senderan v PP [1999] 1 CLJ 343 (refd)
D *Leong Ka Kong v PP* [1976] 2 MLJ 21 (refd)
Lim Guan Eng v PP [1998] 3 MLJ 14, [1998] 3 CLJ 769 (refd)
Manlavak Singh v Ramkirit AIR 1940 Pat 631 (refd)
Mohd Jalani bin Saliman & Anor v PP [1997] 5 MLJ 551 (refd)
Murugaiah v PP [1941] MLJ 17 (refd)
E *New Tuck Shen v PP* [1982] 1 MLJ 27 (refd)
Owners of Steamship Hontestroom v Owners of Steamship Sagaporack [1927] AC 37 (refd)
PP v Chew Ah Hock [1956] MLJ 67 (refd)
PP v Datuk Tan Cheng Swee & Anor [1980] 2 MLJ 276 (refd)
PP v Govindnan a/l Chinden Nair [1998] 2 MLJ 181 (refd)
F *PP v Jafa bin Daud* 1 [1981] MLJ 415 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Sharma Kumari [2000] 2 AMR 2359 (refd)
PP v Sulaiman bin Ahmad [1993] 1 MLJ 74 (refd)
Saad bin Abas & Anor v PP [1999] 1 MLJ 129 (refd)
G *Tan Soo Har v PP* [1975] 2 MLJ 32 (refd)
Teo Chin Hwa v PP [2000] 1 MLJ 687 (refd)
Watt or Thomas v Thomas [1947] AC 484 (refd)
Wong Kim Leng v PP [1997] 2 MLJ 97 (refd)

H **Legislation referred to**

Criminal Procedure Code (Act 593) ss 173(h), (2), (j)(1), (2), (3), (m), 261, (a), (b), 307(iv)
Penal Code (Act 574) ss 193, 199
Rules of the High Court 1980 O 2, O 41 rr 1(7), 1(8), 4, 9(2), O 18 r 19, Form 78

I

Appeal from: Arrest Case No A83–237 of 1999 (Magistrate's Court, Kuala Lumpur)

K Kumarendran (*C Vijaya Kumar, V Sithambaram, M Athimulan* and *S Kulasegaran* with him) (*S Kula & Co*) for the appellant. A

Zauyah Be bte Loth Khan (*Evawani Farisyta bte Mohammed* with her) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Wahab J: This is an appeal by the appellant, Sharma Kumari a/p Oam Parkash against her convictions by the magistrate's court on 25 May 2000 on two charges under s 199 read with the first limb of s 193 of the Penal Code (Act 574), to which she was sentenced to three years imprisonment on each charge, both sentences to run concurrently. The appeals against conviction and sentence were heard consecutively. B

The appellant set out 19 grounds in the petition of appeal in respect of conviction. C

Mr Kumarendran, for the appellant, told the court he would submit upon sentence while his colleagues Mr Sithambaram and Mr Athimulan would submit on conviction.

D

Conviction

The charge against the appellant was as follows:

> Pertuduhan pertama
>
> Bahawa kamu pada 30 Oktober 1998 di Mahkamah Sivil 2, Kuala Lumpur dalam Wilayah Persekutuan, di dalam sebuah akuan yang dibuat oleh kamu yang boleh diterima di sisi undang-undang oleh mahkamah tersebut sebagai keterangan iaitu satu afidavit yang didaftarkan di mahkamah tersebut, telah membuat pernyataan palsu dalam afidavit tersebut sepertimana yang digariskan dalam lampiran 'A1' yang dilampirkan bersama dan pernyataan palsu tersebut adalah berkenaan dengan satu perkara material kepada tujuan afidavit tersebut dan pernyataan palsu tersebut kamu tahu atau percaya adalah palsu atau tidak percaya sebagai benar. Oleh itu kamu telah melakukan satu kesalahan di bawah s 199 Kanun Keseksaan yang boleh dihukum di bawah cabang pertama kepada s 193 Kanun yang sama. E F

The words that are the subject of the charge are contained in para (2) of the affidavit of Sharma Kumari a/p Oam Parkash sworn on 30 October 1998 (P8) before the Commissioner for Oaths, Mr Ngui Kee Heong: G

> Saya mengikrarkan afidavit di sini tanpa prasangka untuk menimbulkan bantahan-bantahan fakta bahawa saya bukan orang seperti yang digambarkan dalam tindakan di sini sebagai defendan.

The affidavit was filed by Messrs Ng Yook Woon, Advocates and Solicitors in Civil Suit No S2–22–594–97 in Mahkamah Tinggi Sivil 2, Kuala Lumpur. A translation of the affidavit was included (P8T), and in respect of para (2) it shows: H

> I affirm the affidavit herein without prejudice to raise objections to the fact I am not the person described in the action herein as the defendant. I

The second charge is similar, in respect of another affidavit filed by the same firm of advocates and solicitors in the same civil suit. The affidavit was

affirmed before the same Commissioner for Oaths on 2 December 1998 (P9). The charge is as follows

> Pertuduhan kedua
>
> Bahawa kamu pada 3 Disember 1998 di Mahkamah Tinggi Sivil 2, Kuala Lumpur dalam Wilayah Persekutuan, di dalam sebuah akuan yang dibuat oleh kamu yang boleh diterima di sisi undang-undang oleh mahkamah tersebut sebagai keterangan iaitu satu afidavit yang didaftarkan di mahkamah tersebut, telah membuat pernyataan palsu dalam afidavit tersebut sepertimana yang digariskan dalam lampiran 'AZ' yang dilampirkan bersama dan pernyataan palsu tersebut adalah berkenaan dengan satu perkara material kepada tujuan afidavit tersebut dan pernyataan palsu tersebut kamu tahu atau percaya adalah palsu atau tidak percaya sebagai benar. Oleh itu kamu telah melakukan satu kesalahan di bawah s 199 Kanun Keseksaan yang boleh dihukum di bawah cabang pertama kepada s 193 kanun yang sama.

Paragraph 2 of the affidavit P9 is in identical language as for the affidavit of P8, and was accompanied by a translation (P8T and P9T) in the same words. It is not necessary therefore to reproduce those paragraphs here.

The appeal on conviction dwelt upon issues that the affidavits were not receivable in the civil suit, that s 261 of the Criminal Procedure Code ('the CPC') has not been complied with, and that the learned magistrate never evaluated all of the evidence as required by s 173(m) of the CPC before arriving at a just decision. These issues were argued by Mr Athimulan. Although he made his submissions after Mr Kumarendran, it is more convenient to deal first with the issues raised by Mr Athimulan.

The submissions by Mr Athimulan

The first objection refers to s 199 of the Penal Code:

> False statement made in any declaration which is by law receivable as evidence
>
> Whoever, in any declaration made or subscribed by him, *which declaration any court, or any public servant or other person, is bound or authorised by law to receive as evidence* of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence. (Emphasis added.)

It was argued that because of a defect in the affidavits, the affidavits could only be used with leave of the court, and therefore in the absence of any leave granted, such affidavit cannot be used, and that a primary ingredient of the offence in s 199 fails.

It was submitted O 41 rr 1(7) and 1(8) of the Rules of the High Court 1980 ('RHC') was not complied with because, referring to Form 78, the jurat in the affidavits did not contain the title as in the action, and the words 'To an affidavit by a deponent ...' .

> Order 41 r 1
>
> (7) Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn.
>
> (8) A jurat must be in one of the forms in Form 78. (Emphasis added.)

Form 78 provides:

No 78

Forms of Jurat (O 41 r 1)

(Title as in action)

(a) To an affidavit by one deponent ..... Sworn(or affirmed) on the ..... day of ....., 19 ....., at (Through the interpretation of .....).

Before me

.....
Commissioner for Oaths

(b) To an affidavit by two or more deponents ..... Sworn (or affirmed) by the deponents ..... and ..... (or by both (or all) of the above-named deponents) on the ..... day of ....., 19 ....., at (Through the interpretation of .....).

Before me

.....
Commissioner for Oaths

(c) To an affidavit by an illiterate or blind person .....Sworn (or affirmed) on the ..... day of ....., 19 ....., at .....

I, having truly, distinctly and audibly read over the contents of the above affidavit (add if exhibits are referred to in the affidavit 'and explained the nature and effect of the exhibits therein referred to') to the said deponent who seemed perfectly to understand the same and who made his mark thereto in my presence (Through the interpretation of .....).

Before me

.....
Commissioner for Oaths

(d) To an affidavit by a person who does not understand English. Sworn (or affirmed) on the ..... day of ....., 19 .....at ..... through the interpretation of ..... (if the interpreter is not a court interpreter add the following:
'the said ..... having been first sworn that he had truly, distinctly, and audibly translated the contents of his affidavit to the deponent ..... and that he would truly and faithfullly interpret the oath (or affirmation) about to be administered unto him the said .....').

Before me

.....
Commissioner for Oaths

In *Han Euu Tiam v Phang Kui Fatt & Ors* [1999] 4 CLJ 395, Mohd Hishamudin J held that the title as in the action must be stated at the top of the jurat (at p 400):

> In my judgment, there is merit in this preliminary objection. Clearly there has not been compliance with O 41 r 1(7) and (8) and Form 78. First, there is no title in the jurat used in all the four affidavits. A jurat is a certificate and it is clear Form 78, by the presence of the words:
>
> (Title as in action)
>
> appearing at the top part of the Form, that the title of the action must be stated at the top part of the certificate.

With respect, reference to a jurat as a certificate per se is possibly misleading. Even though the *Malaysian Court Practice* (Malayan Law Journal Sdn Bhd, 1997) Vol 1 at p 2515 described a jurat as a certificate of the administering officer before whom the affidavit was sworn, that statement is qualified:

> It refers to the clause written at the foot of the affidavit, stating when, where, and before whom such affidavit was sworn.

Jowitt's Dictionary of English Law (1977 Ed) defined 'jurat' as:

> Jurat, the statement at the foot of an affidavit of the names of the parties swearing it, and of the officer before whom it is sworn, of the date, and of any other necessary particulars, as that the affidavit of an illiterate or blind person was read in the presence of an officer to such person and that he seemed perfectly to understand it (RSC, O 41 rr 1, 3).

In simpler language, the jurat is simply the signature clause of an affidavit, at the end of the affidavit, containing the signatures of the deponent and the commissioner for oaths, with the date and place where it was signed together, as applicable, with particulars as to whether it was the affidavit of a blind, illiterate person etc. It is in fact the signature clause of the affidavit. This view is supported by the fact that O 41 of the RHC refers to affidavits generally, and not to jurats alone. Thus it would be redundant to put the 'title as in action' immediately before the jurat since the title is already contained at the beginning of the affidavit. It is self evident from practice that the affidavit would look quite unusual if the heading of the affidavit appears before the signature clause.

Augustine Paul J in *Mohd Nazir bin Badar Shair v Timbalan Menteri Dalam Negeri* [2000] 2 MLJ 559 at p 566, having the benefit of reference to the above judgment respectfully disagreed with it:

> The presence of the words in brackets means that the forms provided have in contemplation the whole of O 41 r 1 of the RHC. Thus the rule must be read as a whole in order to determine whether the words '(Title as in action)' refer to the jurat or the affidavit itself. In this regard the part of O 41 r 1 that warrants consideration is sub-r (1) which reads as follows:
>
> 'Subject to paras (2) and (3), every affidavit sworn in a cause or matter must be entitled in that cause or matter.'

> This is the only part of O 41 r 1 of the RHC which makes reference to the title of the cause or matter. As Form 78 relates to the whole of O 41 r 1 of the RHC it must be read together with the sub-rule. It follows that the words '(Title as in action)' relate to the affidavit. Thus what must carry the title of the action is the affidavit and not the jurat.

I would, with respect, agree with the reasoning in *Mohd Nazir*'s case that the words '(Title as in action)' in Form 78 refer to the title in the affidavit, and that the RHC does not intend that the title of the affidavit should appear before the jurat. Therefore there is no defect in the affidavits of the appellant in this case.

Objection was taken before the magistrate that the affidavit did not comply with O 41 r 9(2) of the RHC, in that the affidavit was not indorsed with a note showing the dates of swearing or affirmation and of filing. Such indorsement is ordinarily at the end of the affidavit. The said rule provides:

> 9 Filing of affidavits (O 41 r 9)
>
> (1) Except as otherwise provided by these rules, every affidavit must be filed in the Registry
>
> (2) Every affidavit *must be indorsed* with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without the leave of the court. (Emphasis added.)

The rule does not provide that the affidavit cannot be filed or used, period. The rule provides it may not be filed or used without leave of the court. In other words, the defect does not render the affidavit to be incapable of being used. The affidavits in this case were each intended to be used as an affidavit, and affirmed as an affidavit by the deponent. It was submitted for filing to the registry of the High Court. It was received for filing by the registry. It is clear that leave for filing was given or deemed to be given by the court, since without such leave it would not have been accepted for filing. The use of the word 'or' in O 41 r 9(2) allows that for the purpose of O 41 r 9(2), filing and use may be treated separately, since leave of court to use the affidavit formally could not have be considered by the court until the affidavit is filed. Such affidavit would ordinarily be allowed to be used unless there is objection raised for non-compliance; and even in the event of non-compliance.

Even assuming that the affidavits are defective, O 41 r 4 of the RHC deals with the use of defective affidavits. It provides:

> An affidavit may, with the leave of the Court, be filed or used in evidence notwithstanding any irregularity in the form thereof.

The above rule reinforces O 2 which provides as follows:

> ORDER 2
>
> EFFECT OF NON-COMPLIANCE
>
> 1 Non-compliance with rules (O 2 r 1)
>
> (1) Where, in beginning or purporting to begin any proceedings or *at any stage in the course of or in connection with any proceedings*, there has, by

A reason of *any thing done or left undone, been a failure to comply with the requirements of these rules*, whether in respect of time, place, manner, form or content *or in any other respect*, the *failure shall be treated as an irregularity and shall not nullify* the proceedings, any step taken in the proceedings, or any document, judgment or order therein

B (2) Subject to para (3), the court may, on the ground that there has been such a failure as is mentioned in para (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these rules *to allow such amendments (if any) to be made* and to make such order (if any) dealing with the proceedings

C generally as it thinks fit.

(3) The court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.

D 2 Application to set aside for irregularity (O 2 r 2)

(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within, a reasonable time and before the party applying has taken any fresh step afiter becoming aware of the irregularity.

E (2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion. (Emphasis added.)

Thus the onus of objection if made upon the affidavits, is upon the other party, within reasonable time and before he has taken any fresh step. It is a F perversion and abuse of the process of the court that the party filing the irregular affidavit be allowed to object upon the admissibility and use of that affidavit to escape from any liability it is exposed to by the said affidavit. There is nothing in the evidence that the other party in the civil suit had objected to the filing and use of the impugned affidavits containing the statement that is the subject of the charges against the appellant. It is G accepted that the civil suit was heard and concluded.

Counsel conceded as a fact that the affidavits were filed in the Civil Suit No S2–22–594–97. Since for the very practical reason that a court is not in a position to grant leave for the filing of a defective affidavit unless it has seen the defective affidavit, and it would not see the affidavit unless it has H been filed, the practical, purposive and enabling interpretation of O 41 r 4 is that it provides a basis for the court to order that defective affidavits be rejected before use. The fact the affidavits were filed implies there is leave to file such defective affidavits, and the issue of defect is dealt with when an objection is raised. This may be inferred from the absence of any order to refuse acceptance of an affidavit with the particular defect complained of. I Thus at the time of filing, the registry is authorized to receive it.

The sub-argument that the afffidavits could only be used with the leave of the court ignores the fact that O 41 r 4 is not confined to the use of a

defective affidavit, but encompasses the filing of it. Similarly, for the argument to succeed, one must confine the reading of s 199 of the Penal Code to the use of it. That however fails to recognize that s 199 applies also to 'authorized by law to receive as evidence ...'. Clearly it was not challenged that the registry was authorized to receive the affidavit when it was filed, or that O 41 r 4 itself authorizes rather than prevents the court from receiving the affidavit as evidence of the facts it asserts by authorizing the court to give leave.

The sub-argument based on the absence of leave therefore does not stand scrutiny.

The second submission relies on s 261(a) of the CPC which provides:

> Change of magistrate during hearing
>
> Whenever any magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and who exercises such jurisdiction, the magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial:
>
> Provided as follows:
>
> (a) in any trial the accused may, when the second magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and reheard;

The case of *Chelliah v PP* [1941] 1 MLJ 17 was cited. In that case the appellant was charged with driving with inefficient brakes. Prosecution witnesses were called on 24 March 1939. Then the trial was adjourned to 31 March 1939. On that day, there was a further adjournment to 21 April 1939. There was no record of any hearing on 21 April 1939, but the trial was resumed before another magistrate on 26 January 1940. No decision had been made by the first magistrate as to whether to call for the defence. The case was still in the prosecution stage and without doubt s 261 applied. The circumstances in this case differ from *Chelliah*'s case which therefore offers very little assistance.

The learned magistrate in this case, Cik Juliana bte Mohd, had taken over the case after the transfer of the previous magistrate, En Kamarul Zaman A Rahman. The previous magistrate had discharged and acquitted the appellant at the end of the prosecution case. Upon an appeal to the High Court, the High Court ordered the defence to be called. She was obliged therefore to commence the proceeding by calling for the defence. Thus the learned second magistrate was no longer at the stage of s 173(h) of the CPC, but at s 173 (j)(2) when she took over the trial. The second magistrate was acting under a court order to call for the defence.

When the demand to re-call PW6 was made, the second magistrate was confronted with equally specific provisions. While s 261 of the CPC dealt with re-summoning and re-hearing of witnesses in the specific circumstance of a change of magistrate, s 173(j)(3) is equally particular and specific, and deals with the proceeding when defence is called under s 173(h):

(3) When the accused is called upon to enter on his defence, he may produce his evidence and shall be allowed to recall and cross-examine any witness present in the court or its precincts;

Provided that if the accused elects to be called as a witness, his evidence shall be taken before that of other witnesses for the defence:

Provided further that any accused person who elects to be called as a witness may be cross examined on behalf of any other accused person.

Section 173 of the CPC is not written in a rigid sequential manner but by necessity takes account of the procedural contingencies that may occur in the course of a trial. There are no other sections that provide for the subsequent steps after the defence is called under s 173(h)(2). Sections 173(j)(1) and 173(j)(2) deal with the situation of the court amending the charge. Section 173(j)(2) provided that if the accused does not plead guilty to the amended charge the court shall call him to enter his defence. Section 173(j)(3) provides for the rights and procedures when the accused enters his defence. Section 173(j)(3) thus follows on not only from s 173(j)(2) but also from s 173(h)(2). Thus an accused who is called upon to enter his defence under s 173(h)(2) must first elect whether to be called as a witness, and the proviso to s 173(j)(3) makes it mandatory that if he so elects, his evidence must be taken before that of other witnesses for the defence.

Section 173(j)(3) above also provides that if any prosecution witness is present in the court or its precincts he may be re-called and cross-examined. Thus the accused must first verify if the witness is in court or its precincts, and if he is, then the accused must make an application under s 173(j)(3) of the CPC. From the record, no such action was taken. Instead an application was made immediately under s 261 to re-call witnesses. It is a wrong application of s 261 to use it generally to re-call witnesses. It is there to re-summon and re-hear witnesses who had been previously summoned, called and heard, and who are no longer in the court precincts.

While it is true that s 261(a) of the CPC allows the accused to 'demand', it is essential to read that 'demand' in the proper context. Section 261(a) provides that the accused may demand that the witnesses or any of them be re-summoned and re-heard. There is no provision that proceedings be stayed until such witnesses have been re-summoned and re-heard. This supports the reasoning that at the stage of ss 173(h)(2) or 173(j)(2) the accused person must first proceed under s 173(j)(3) and verify those witnesses who are in court or within its precincts. Section 261 is to be resorted to, as applicable, after that verification and applies to those witnesses who are not in court or within its precincts, and therefore need to be summoned or re-summoned, which means the issue of fresh summonses.

For these reasons the learned magistrate was entirely correct in refusing to consider the demand to re-call witnesses under s 261 when she began proceedings under s 173(h)(2).

Even if the learned magistrate has erred, such error is not necessarily fatal, because s 261(b) itself provides that:

(b) the High Court may, whether there be an appeal or not, set aside any conviction had on evidence not wholly recorded by the magistrate before whom the conviction was had, if such court is of opinion that the accused has been materially prejudiced thereby, and may order a new trial.

In other words, the High Court must consider if the accused has been materially prejudiced by the reliance of the learned magistrate upon evidence not recorded by her. Since proviso (b) shows that where the evidence is not wholly recorded by the magistrate, the High Court may set aside the conviction only if the High Court is of the opinion the accused has been materially prejudiced, it follows that notwithstanding that the accused may demand the re-call under proviso (a), the magistrate may refuse because a refusal to an application under proviso (a), which prevents from having the evidence of that witness to be recorded by the second magistrate, is not necessarily fatal, but only lays the ground for an application to the High Court for review under proviso (b). It follows also that the accused, in making a demand under s 261(a) should give reasons indicating material prejudice if the demand is refused. The demand under s 261 is therefore not a peremptory demand, but that the applicant must show that the accused had been materially prejudiced by the refusal. There was however no submission made specifically under this ground to show any material prejudice to the accused, be it before the magistrate or this court.

The third and last submission dealt with by Mr Athimulan is that the learned magistrate never considered or evaluated all the evidence before arriving at a just decision. In this regard *Saad bin Abas & Anor v PP* [1999] 1 MLJ 129 (CA), at p 133 offers little assistance upon the ground submitted upon because it was dealing with the issue of whether a case has been 'finally' decided for the purpose of an appeal. The real issue before the court at the end of the trial is to decide as provided under s 173(m) of the CPC:

(m) (1) At the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

(2) If the court finds that the prosecution has proved its case beyond reasonable doubt, the court shall find the accused guilty and he may be convicted thereon and the court shall pass sentence according to law.

(3) If the court finds that the prosecution has not proved its case beyond reasonable doubt, the court shall record an order of acquittal.

The magistrate's court must consider all of the evidence before it.

Having heard the defence, the learned second magistrate had carefully considered the evidence of the three defence witnesses, before making her decision at the end of the case. In her grounds of decision at p 313 of the appeal record she had stated her finding, in strict compliance with s 173(m) of the code that:

... Seterusnya, mahkamah ini telah memutuskan bahawa pihak pendakwaan telah membuktikan kes terhadap OKT melampaui keraguan munasabah lalu mensabitkan OKT dengan dua-dua tuduhan tersebut. ...

A In this case, the first magistrate had acquitted and discharged the accused. Upon appeal to the High Court, the High Court had decided that the first magistrate had erred and ordered that the defence be called. The second magistrate had no other course but to call for the defence. Upon questions of law, the rulings of the High Court are binding upon the magistrate. On questions of facts, the second magistrate is obliged to make a final decision B upon all of the evidence before her. The words used in *PP v Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276 (FC) serve well:

> If the dictum merely expresses a fundamental principle, then clearly more should not be read into the Federal Court judgment than what was written therein. There was never any open invitation to the trial court to acquit C whatever the evidence. On the other hand, it was also not a direction to convict. All that it said and meant was that trial court should reasonably, properly and judicially consider the defence in the light of the prosecution case and come, on the totality of the evidence before it, to a correct decision, without fear or favour, in the proper exercise of its judicial function.

Now, in this case the second magistrate heard the defence witnesses. The D defence application under s 261 was rejected, and there was no subsequent application under s 173(j)(3) or s 425 of the CPC. She was not called upon to review any new or fresh evidence from prosecution witnesses that the first magistrate or the High Court in the appeal had no access to, as might change the weight, value or effect of the evidence on record of the E prosecution witnesses. As in *Datuk Tan Cheng Swee*'s case and *Mohd Jalani bin Saliman & Anor v PP* [1997] 5 MLJ 551, it was therefore unnecessary for her to traverse all the arguments and rulings again since with regard to the facts in the prosecution stage of the case, she was in no better position than the High Court which had ordered to call for the defence. She could not in any case ignore the High Court decision.

F Having reviewed the reported judgment of Augustine Paul J in the appeal from the decision of the first magistrate (see *PP v Sharma Kumari* [2000] 6 MLJ 254), it is clear to this court that decision is largely grounded upon questions of law and had not made a final decision as to the inferences to be drawn from the basic facts that was proven. It is also clear the learned second magistrate had not read more into the judgment of the High Court G than that which was written therein. With the basic facts as such being undisputed, the findings of fact of the second magistrate are essentiality in respect of the *inferences* to be drawn from the facts: whether she had made a false statement when she said she was not the person described as Sharma Kumari Shukla, or whether in so stating her only intent was to make a H correction as to her name. If the second inference was in the least probable, the defence would obviously not have been ordered by the High Court. The learned second magistrate therefore needed only to consider whether in the light of the evidence she has heard, there is a reasonable doubt raised that the appellant only intended to correct an error with regard to her name.

In her grounds of decision, she had explained her reasoning. The effect I of the defence evidence was clearly considered by the learned second magistrate. While there is a rule that a judgment must be a speaking judgment, in the sense it must be self-explanatory, there is as wide a latitude

as there are judges and magistrates in the style adopted to explain or set out one's reasoning. A magistrate is as entitled as anyone else to freedom of expression. In *Mohd Jalani*'s case, it was held (at headnotes (2), following *Junaidi bin Abdullah v PP* [1993] 3 MLJ 217 and distinguishing *Murugaiah v PP* [1941] MLJ 17 that:

> Magistrates need not write lengthy judgments in the course of their duties. There is no statutory provision that requires the trial judge to expressly record the reasons for calling the defence. Suffice if magistrates put the facts and the law on paper as concisely as possible. Although the trial court did not give an explanation as to the law involved, the findings were in accordance with the law that the appellants had committed the offences with which they were charged. What amounts to a 'speaking judgment' varies from case to case (see p 565B–D).

As can be seen readily below, the defence evidence was directed to the question of the inferences to be drawn from the undisputed evidence in the prosecution case. Whether the reasoning is written from the point of view of whether the defence has raised a reasonable doubt rather than whether the prosecution had proved its case beyond reasonable doubt is simply semantics. It is absolutely clear in her finding that she had found that the prosecution had proved its case beyond reasonable doubt as required by s 173(m) of the CPC.

The fact that the learned second magistrate chose to write her judgment so concisely however gives an opportunity to the appellant to argue that the learned magistrate had not considered all of the evidence, hence the submissions by Mr Sithambaram, whether from a consideration of all of the evidence adduced she could not have arrived at the conclusion that she did. If she could not have arrived at the conclusion that she did, it would mean that she had failed to comply with s 173(m) to consider all of the evidence adduced.

The submissions by Mr Sithambaram

The elements that require to be proved in a charge under the section, as stated in *Ratanlal & Dhirajlal's Law of Crimes* (24th Ed) Vol 1 at p 854, are as follows:

(1) that the accused made, or subscribed the declaration in question;

(2) that a Court of Justice, etc was bound or authorized to receive such declaration as evidence;

(3) that the accused made the statement in question contained in such declaration;

(4) that such statement was false;

(5) that such false statement touched a point material to the object such declaration; and

(6) that when making such false statement, the accused knew that it was false, or believed it to be false, or did not believe it to be true.

In all fairness, Mr Sithambaram conceded that the appellant Sharma Kumari a/p Oam Parkash made the affidavits and the impugned statements

in the said affidavits; and that the affidavits were filed in the said civil suit. He sought, however, to submit that it was not proved:

(1) the statement was false;

(2) the statement touched on a point material to the object of the declaration; or that

(3) the appellant knew that the statement was false, believed it to be false or did not believe it to be true.

The starting point of his submission is that reading the paragraphs following para (2) of the impugned affidavits if not all the documents filed by the accused in the entire proceedings, it will be seen that the accused was submitting herself to the jurisdiction of the High Court in Civil Suit No S2 22–594–97. It was argued that there was the evidence of PW2 in re-examination that there was an application (exh P39) filed on 19 June 1998 to strike out the suit under O 18 r 19 the RHC by the appellant. It was submitted that if the appellant had denied she was the defendant in the civil suit, she would have applied to strike out the claim on the basis that she was the wrong party. It was urged upon the court that although it was opportune to do so in the O 18 r 19 application, she had never denied she was the defendant and indeed stated in para (1) of the supporting affidavit to the application as follows:

> Saya adalah defendan di sini tetapi salah dihuraikan dan menyatakan di sini perkara-perkara di dalam pengetahuan saya sendiri melainkan apa-apa yang dinyatakan sebaliknya.

It was submitted that that was on 19 June 1998, and therefore before the complainant's police report on 11 December 1998, shows that the appellant was only informing the court she was wrongly named and had no intention to claim she was not the defendant. Thus, it was submitted that at the heart of this case is the appellant, by pointing out that her legal name is Sharma Kumari a/p Oam Parkash and not Sharma Kumari Shukla, by which she is also known as, ended up being prosecuted. Mr Sithambaram further supported the argument by submitting that in legal proceedings the name as per the identity card must be disclosed, that Shukla is her family name but does not appear in her identity card. It was brought to the attention of the court that although the letter of offer of employment (exh P1) signed by the complainant was addressed to Sharma Kumari Shukla, she had signed it as Sharma Kumari. Further other evidence by the appellant of cheques (exhs D30 and D31) in 1995 showed that though issued to Sharma Kumari Shukla, 'Shukla' was crossed out, and contradicted the evidence of the complainant SP1 that he did not know the appellant as Sharma Kumari, but only as Sharma Kumari Shukla.

Reference was also made to exh P46(b), being the affidavit verifying documents affirmed by the appellant Sharma Kumari a/p Oam Parkash on 27 November 1998 wherein she affirmed in para (1) thereof:

> Saya adalah defendan dalam tindakan ini tetapi bukan dinamakan seperti di atas.

These submissions had not been made before the learned magistrate in this manner. Appreciating the point that it is difficult to say the learned magistrate had erred if the issue above had not been put to her for consideration, Mr Sithambaram cited *DP Vijandran v PP* [1999] 1 MLJ 385 (CA), wherein a new point not argued before the trial court was considered in an appeal. He relied on the obiter remarks, summarized by the editors of the Malayan Law Journal as:

> Obiter:
>
> It is the settled practice of this court not to interfere with concurrent findings of fact save in very rare cases, such as when it could be shown that the course of events affirmed by the trial judge could not have occurred. Appellate interference may also be warranted where the trial judge had failed to critically assess and analyse the prosecution's evidence. However, the present instance was not one which fell into any of the recognized categories of cases where this court may interfere with concurrent findings of fact (see p 413D–F).

It is wrong to read the obiter statement as a wholesale licence to bring up new issues not put before the trial judge in the first instance. The obiter statement restricted itself to interference by an appellate court in findings of fact of a trial court to rare cases. The instances shown are cases of clear error. Secondly, if an issue of fact is not put before the trial court, the other party would not have had an opportunity to call witnesses to answer the issue raised. In such a case it would be wrong to allow the new point. Thirdly, appeals from the magistrate's and sessions courts to the High Court in criminal cases are governed by the CPC, where grounds of appeal must state the substance of the judgment appealed from, and shall contain definite particulars of the points of law or of fact in regard to which the court appealed from is alleged to have erred (see s 307(vi) of the CPC). Since the appeal is confined to assertions that the trial judge has erred, then it follows that if a matter was not put in issue before the trial judge, it cannot be said he had erred in respect of that matter. It is also clear that while an appeal under the CPC may be a continuation of a hearing, it is not a re-hearing at the High Court where new points may be raised at any time. Fourthly, the petition of appeal together with the grounds have to be filed within a time limit (see s 307(iv) of the CPC). This precludes raising new grounds of error at any time outside the time limit. A strict application is essential for the due administration of justice to ensure prosecution as well as defence are conducted with full preparation to put all issues fairly before the trial court in an orderly manner, and appeals are confined to errors of the trial court. If parties are allowed to raise new issues at any stage, including appellate stages, trials and intermediate appeal stages become purely secondary. It will open floodgates of appeals.

The mistaken notion that an appeal is a re-hearing derives from *Balasingham v PP* [1959] MLJ 193 where the term was used in relation to the need for a speaking judgment:

> In addition such a laconic expression is far from helpful to the appellate court guided only by the printed evidence to ascertain whether the conviction is against the weight of the evidence. But here I find substantial reasons for

A interference. An appeal is merely a continuation of proceedings by way of re-hearing and litigants as well as the appellate court are entitled to know the reasons for the finding. The trial court is under a statutory obligation under s 308 of the CPC to transmit to the appellate court the grounds of decision which convey to my mind a reasoned judgment on the facts and the law not merely the conclusion arrived at. The advantage of a 'speaking' judgment B needs no emphasis.

Even in the case of a re-hearing, as in the civil jurisdiction, it is well to recall the words of Lord Sumner in *Owners of Steamship Hontestroom v Owners of Steamship Sagaporack* [1927] AC 37 at p 47:

C What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute: It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation.

D Similar views were expressed by Lord Thankerton in *Watt or Thomas v Thomas* [1947] AC 484 at pp 487–488 as follows:

...: (i) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, E should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; (ii) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion ... .

F But an argument bearing upon an issue of act may however be raised in the grounds of appeal even if it has not been put before the trial judge if it is confined to a matter of inference from other facts, and it is clear from the circumstances it is not a matter upon which further evidence could be brought to answer the argument. The submission by Mr Sithambaram falls in such a category. It is not an entirely frivolous argument and merits G consideration. He has presented an alternative inference from the facts available before the learned second magistrate. Even though the magistrate cannot be said to have erred in not considering it for the obvious reason that the inference had not been put before her for consideration in the first place, there is no other ground of objection, for example, that had it been raised during the trial, other evidence could have been adduced to counter H it. I had therefore proceeded to consider the submissions by Mr Sithambaram.

Much assistance may be derived from the police report in which the complainant has fairly and precisely set out his complaint:

Report

I I have filed a civil suit (Ref: High Court of Malaya at Kuala Lumpur (Civil Division) Civil Suit No S2–22–594–97) against one Sharma Kumari Shukla. Sharma Kumari Shukla is also known as Sharma Kumari a/p Oam Parkash.

She was and is however popularly known as Sharma Kumari Shukla or just Sharma Shukla ('Sharma'). A

The aforesaid civil suit ('the said suit') relates to a claim by me against her as me being the rightful and legitimate owner of the said 'Insas Bhd' shares that was fully paid by me, and with many conditions attached to it.

Sharma had also told, induced and misrepresented to me several times about her real and true name being 'Ms Sharma Kumari Shukla'. As a result of that, her letter of appointment from Glamoir World of Sports, salary vouchers, official company correspondence and documentations, as well as many other official documentations bore the name of 'Sharma Kumari Shukla'. As the Chief Executive Officer of Glamoir World of Sports, Sharma was also officially known as 'Sharma Shukla' and was often and always introduced and known publicly as 'Sharma Shukla'. B C

In the said suit, Sharma has made declarations in various and many court documents that she is not the person known as Sharma Kumari Shukla, the defendant described as such in the said suit. Such declarations I believe are false to her knowledge and also tantamount to a material falsity as they seriously challenge the identity of the defendant who is one of the vital parties to the said suit, and therefore attack the very substratum of the said suit. D

I respectfully refer you to the following false declarations made by her in the said suit:

(a) In her 'Defence' dated 4 February 1998, to my statement of claim she averred in para (1) that '... She is not the person described as the defendant herein ...'; or, otherwise, defendan menafikan bahawa dia adalah orang yang dinamakan sebagai defendan. E

(b) Similarly she repeated the above averment in her amended Defence, dated 14 October 1998, wherein she averred that 'she is not the person described as the defendant herein'.

(c) In her affidavit dated 30 October in para 2, she declared again that '... saya bukan orang seperti yang digambarkan di dalam tindakan di sini sebagai defendan.' F

(d) But, however, in her 'Afidavit Menentusahkan Senarai Dokumen', dated 27 November 1998, Sharma lied and contradicted herself by swearing that 'saya adalah defendan dalam tindakan ini tetapi bukan dinamakan seperti di atas'. Sharma also contradicted herself by submitting her 'letter of appointment from Glamoir World of Sports', as her own exhibit. In that said letter of appointment, her name was stated as 'Sharma Kumari Shukla'. G

(e) Sharma had also attempted to misrepresent and provide false document to the court by her submission of 'Afidavit Menentusahkan Senarai Dokumen' dated 27 November 1998, using the title or heading name of 'Sharma Kumari', instead of 'Sharma Kumari Shukla', as proven in title or heading of all documents and affidavits presented within the court of S2–22–594–97. H

(f) Sharma lied, misrepresent and attempted to provide false document to the court of S2–22–594–97 again on 2 December 1998, when she submitted a false and misleading afidavit, wherein she contradicted her 'Afidavit Menentusahkan Senarai Dokumen' dated 27 November 1998, by swearing that 'saya bukan orang seperti yang digambarkan dalam tindakan di sini sebagai defendan' or otherwise, 'that I am not the person as described in the action herein as the defendant'. I

Therefore, Sharma's sworn affidavits in the court of S2–22–594–97, which is still in a stage of judicial proceeding implicates Sharma as knowingly fabricating false evidence, intentionally makes sworn affidavits and documents containing a false statement of which that statement appeared in evidence and exhibits in the said judicial proceedings. Sharma had also used such sworn affidavits and documents knowing the same to be false, and made sworn statements which is false in which she knows and believed to be false.

The above declarations stating that she is not known as Sharma Shukla or Sharma Kumari Shukla are false because of the following reasons:

(a) when Sharma fomerly worked in TV2 as a newsreader, she was always introduced as 'Sharma Shukla' or 'Sharma K Shukla';

(b) in her letter of appointment with Insas Bhd dated 29 November 1993, she was addressed as 'Sharma Kumari Shukla'. She accepted the letter of appointment although she filled up her name as 'Sharma Kumari';

(c) in her letter of appointment with Glamoir World of Sports (M) Sdn Bhd, dated 7 August 1996, she was again referred to as 'Sharma Kumari Shukla' and she accepted the appointment although again she wrote therein as 'Sharma Kumari';

(d) in her Citibank Visa Card No 4563–77304990–7735 valid from 01/97 through 01/99, her name was stated as 'Sharma K Shukla' ('K' for Kumari); and

(e) in all major correspondence whilst employed by Glamoir, she was referred to as 'Sharma Shukla', 'Sharma K Shukla' or 'Sharma Kumari Shukla'.

Sharma may have her name in her identity card as 'Sharma Kumari' but she has always represented herself in both official and business matters as 'Sharma Shukla' or 'Sharma Kumari Shukla'. She has adopted 'Shukla' as one of her names.

Based on the aforesaid, I believe that offences under ss 192, 193, 199 and 200 of the Penal Code have been committed and I therefore urge the authorities to investigate and prosecute her for these serious offences against the judicial system.

In para (2) of P8 and P9 respectively, which it is not denied was made by the appellant, she had said:

> Saya mengikrarkan afidavit di sini tanpa prasangka untuk menimbulkan bantahan-bantahan fakta bahawa saya bukan orang seperti yang digambarkan dalam tindakan disini sebagai defendan.
>
> [I affirm the affidavit herein without prejudice to raise objections to the fact I am not the person described in the action herein as the defendant.]

The learned magistrate had summarized fairly and adequately the appellant's case and evidence at p 2 until the top of p 6 of her grounds of decision, before concluding:

> Setelah diteliti secara keseluruhan, mahkamah berpendapat bahawa keterangan OKT bercanggah dengan apa yang dinyatakan di dalam eks P8 dan P9. Mahkamah difahamkan dan afidavit berkenaan bahawa OKT mengatakan bahawa defendan bernama Sharma Kumari Shukla itu tidak merujuk kepada beliau, sedangkan di dalam keterangannya beliau mengakui bahawa beliau juga dikenali dengan nama Sharma Kumari Shukla.

Pendapat mahkamah mengenai percanggahan ini disokong oleh keterangan SD3 di mana beliau tidak menafikan nama Sharma Kumari dan Sharma K Shukla yang tertera dalam borang permohonan kad kredit merujuk kepada orang yang sama.

Mahkamah menolak hujahan pihak pembelaan mengenai tujuan OKT mengikrarkan perenggan (2) tersebut. Ini adalah kerana mahkamah berpendapat bahawa dalam mentafsirkan sesuatu dokumen niat pihak-pihak yang terlibat mestilah disimpulkan dari dokumen itu sendiri.

The cardinal rule of interpretation is that the intention of the parties must be gathered from the document itself. In the case of an affidavit, sworn by the deponent, the intention and meaning must be derived from the affidavit itself. Where there are contradictions within the document, such contradictions have to be viewed closely. The primary source of reference must be the document where the statement is made in order to determine the meaning and intention. The plain and natural meaning of these words is that she is not the defendant Sharma Kumari Shukla, being the name used in the action D2–22–594–98.

It is clear that para (2) in P8 and P9 meant not only she is not the person as described or named in the action but she specifically reserved the right to object on that ground. She did not simply say that Sharma Kumari Shukla is not her name as in her identity card. If the intention is to simply make a correction as to her name, it would not be necessary to further state that she reserved the right to object on that ground, that is, that she was not Sharma Kumari Shukla. In so doing she reserved the right to negate her submission to the jurisdiction to the court.

The specific reservation following on the statement she was not Sharma Kumari Shukla shows that the statement she was not Sharma Kumari Shukla was totally material to the object, which is to reserve the right to object on that ground. When the appellant reserved the right to object on that ground, the words 'bahawa saya bukan orang seperti yang digambarkan dalam tindakan di sini sebagai defendan' became a statement that touched on a point material to the object for which the affidavit is made.

In the light of evidence of the fact that the appellant had used the name Sharma Kumari Shukla in memo-notes, accepted letters of appointment addressed to Sharma Kumari Shukla, her own evidence that she used the name Sharma K Shukla in her identity card and that Shukla is her family name, it cannot be denied that she had acknowledged Sharma Kumari Shukla is also her name. If Sharma Kumari Shukla and Sharma Kumari are not one and the same person, she would be honest enough, it is hoped, not to have accepted the letters of offer addressed to Sharma Kumari Shukla. Furthermore, the notes or memorandum used by her carried the style 'From the desk of Sharma Kumari Shukla'. The inference is irresistible that she was also known as Sharma Kumari Shukla. It is clear then that para (2) of P8 and P9, in their plain and natural meanings, that she was not the person described as Sharma Kumari Shukla, are false statements.

This conclusicn is further supported by the fact that the paragraphs following para (2) of P8 and P9 have nothing to do with para 2, and do not qualify the meaning of para (2) in each of P8 and P9.

A As to the sixth element, it is obvious the appellant was making a statement in respect of a matter she knew directly: whether or not she had used the name Sharma Kumari Shukla as her name. It is not a matter where she is relying upon the opinion or advice of others. It is in respect of her own name. The clear inference is that she knew that it was not true that Sharma Kumari Shukla was not her name. It is therefore a deliberate false B statement. Even if it is a reckless statement, s 199 of the Penal Code would apply: see *Manlavak Singh v Ramkirit* AIR 1940 Pat 631; *Jaggi MS v Registrar, High Court of Orissa* [1983] Cri LJ 1527.

Hence, if the meaning of the words are interpreted from within the four corners of P8 and P9, elements four, five and must be accepted as having C been proved beyond reasonable doubt. Her testimony that her intention was to point out that her official or formal name is Sharma Kumari a/p Oam Parkash cannot stand in the face of the plain and natural meaning of the words and is contradicted by the fact she reserved the right to object on that ground. If the intention is to correct an error, there is no ground for objection, but for a correction.

D

Hence also, Mr Sithambaram has proceeded upon the alternative submission that para (2) of P8 and P9 must be read together with other documents filed by the appellant in Civil Suit No 32–22–594–98.

E The alternative submissions by Mr Sithambaram

The appellant had submitted herself to the jurisdiction of the High Court when she filed an unconditional appearance. At that point it would appear that the appellant had accepted her name was Sharma Kumari Shukla. But then the sequence of events that followed is as follows:

F

D40 6 February 1998 Statement of Defence

1 Defendan menafikan bahawa dia adalah orang yang dinamakan sebagai defendan dan plaintif diperlukan membuktikannya dengan tepat dan terperinci. Defendan memfail pembelaan di sini tanpa prasangka untuk menimbulkan satu bantahan atas isu ini.

G

P39 19 June 1998 Affidavit supporting O 18 r 19 RHC

1 Saya adalah defendan di sini tetapi salah dihuraikan dan menyatakan di sini perkara-perkara di dalam pengetahuan saya sendiri melainkan apa-apa yang dinyatakan sebaliknya.

H

P8 30 October 1998 Affidavit First Charge

2 Saya mengikrarkan afidavit di sini tanpa prasangka untuk menimbulkan bantahan-bantahan fakta bahawa saya bukan orang seperti yang digambarkan dalam tindakan di sini sebagai defendan.

I

[2 I affirm the affidavit herein without prejudice to raise objections to the fact I am not the person described in the action herein as the defendant]

P46 27 November 1998 Affidavit verifying documents

1 Saya adalah defendan dalam tindakan ini tetapi bukan dinamakan seperti di atas ...

P9 3 December 1998 Affidavit Second Charge

2 Saya mengikrarkan afidavit di sini tanpa prasangka untuk menimbulkan bantahan-bantahan fakta bahawa saya bukan orang seperti yang digambarkan dalam tindakan di sini sebagai defendan.

[2 I affirm the affidavit herein without prejudice to raise objections to the fact I am not the person described in the action herein as the defendant.]

P10 11 December 1998 Complainant's Police Report

In her statement of defence she denied she was the person named in the suit, and reserved the right to object on that ground. The application on 19 June 1998 under O 18 r 19 or the RHC to strike out the action (exh P39) was supported by an affidavit where she said she was the defendant in the action 'tetapi salah dihuraikan ...'. Here it appears that while acknowledging she is the defendant, she says her name was wrongly stated as Sharma Kumari Shukla. The grounds for the application were as follows:

(1) Writ saman dan penyata tuntutan di sini dibatal di bawah A 18 Kaedah-Kaedah Mahkamah Tinggi 1980 dan/atau di bawah bidang kuasa yang sedia ada di mahkamah mulia atas alasan-alasan bahawa:

(a) ia tidak mendedahkan apa-apa kausa tindakan atau pembelaan yang munasabah, mengikut mana-mana yang berkenaan;

(b) ia mengaibkan, remeh atau menyusahkan;

(c) ia boleh menjejaskan, menghalang atau melengahkan perbicaraan tindakan itu dengan adil; dan

(d) ia selainnya adalah suatu penyalahan proses mahkamah.

It is obvious that at that stage she was seeking to strike out the entire action. To deny she was the defendant would mean she had no locus standi to apply to strike it out. I cannot therefore accept the ingenious submission that if she intended to deny she was the defendant that was the opportune moment to do so. What is not touched upon in the appellant's submissions is that the defence evidence (D40) showing her statement of defence filed on 6 February 1998 stated as follows:

(1) Defendan menafikan bahawa dia adalah orang yang dinamakan sebagai defendan dan plaintif diperlukan membuktikannya dengan tepat dan terperinci. Defendan memfail pembelaan di sini tanpa prasangka untuk menimbulkan satu bantahan atas isu ini.

The statement of defence is unequivocal that she is not the person named as the defendant, put the plaintiff to proof and reserved the right to object.

A Her later affidavits P8 and P9, the subject of the first and second charges, affirmed on 30 October 1998 and 2 December 1998 respectively, took up this cause and went along further on the road of denial. She said:

> (2) Saya mengikrarkan afidavit di sini tanpa prasangka untuk menimbulkan bantahan-bantahan fakta bahawa saya bukan orang seperti yang digambarkan dalam tindakan di sini sebagai defendan.

B

The translation supplied by the appellant was as follows:

> (3) I affirm the affidavit herein without prejudice to raise objections to the fact I am not the person described in the action herein as the defendant.

C The appellant submitted that these words mean that her name was stated wrongly, and that she was not denying she was the defendant as can be inferred from the subsequent paragraphs in the impugned affidavits and other documents she had filed in the action in her defence. It was submitted that in between 30 October 1998 and 2 December 1998 she affirmed an affidavit verifying documents which stated clearly she was the defendant:

D

> (1) Saya adalah defendan dalam tindakan ini tetapi bukan dinamakan seperti di atas ... .

These submissions however adroit, in my view, confuses between two issues: (a) the meaning of the statement, which is derived from the words in the statement; and (b) the intention which is to be inferred in the light of all E of the circumstances. The defence is that she was not the defendant. That is in the statement of defence. The impugned statements in the affidavits reserved the right to object on the factual ground asserted in the statements, that she is not the defendant Sharma Kumari Shukla. The ground of objection was stated to be 'saya bukan orang itu' or 'I am not the person'. In the denial it is the person that is referred to, and not the name. These F words therefore carry a very clear meaning, that she was not the defendant. Since para (2) reserves that ground of objection, the other paragraphs were not necessarily relevant and do not qualify the meaning of para (2). In the light of the ground of objection specifically reserved in para (2), those other paragraphs in the affidavits are nothing more than statements on the alternative objection assuming she was the defendant. While there were G documents such as the affidavit verifying documents, the unconditional memorandum of appearance and affidavit in support of the O 18 r 19 application, there remained the statement of defence that she was not the person named as the defendant, and reserved the right to object on that ground.

H Thus proceeding beyond P8 and P9 does not materially affect or alter the conclusion as to interpretation of para (2) in P8 and P9. P8 and P9 disclosed she was proceeding on various defences. The statement in para (2) of P8 and P9 has little to do with other defences raised, but is directly related to the defence in the appellant's statement of defence that she, Sharma Kumari a/p Oam Parkash, is not the person named in the I action as the defendant, that is Sharma Kumari Shukla. The objection, as in the affidavits, is that she was not the person named as Sharma Kumari Shukla, and not that Sharma Kumari Shukla was not her name as in her

identity card. Thus far from raising any doubt as to the meaning and intent of para (2) in P8 and P9, the assertion in the statement of defence only confirms the plain and obvious meaning of para (2). A

Thus it is apparent that the defence that she is not the defendant, planted in the statement of defence in February, continued to be nurtured in October the same year; and if a secondary affidavit verifying documents introduced any doubt as to whether that line of defence was still being reserved, the affidavit of December the same year quickly banished such thoughts. The sequence of events clearly show that the right to object on the ground she was not Sharma Kumari Shukla was being maintained. At no time did she state she was also known as Sharma Kumari Shukla but that is not her official or formal name for the purpose of a legal suit as is now being argued. B C

To summarize, the thrust of the argument is clearly upon a question of interpretation or inference to be drawn from the impugned statement in the affidavits. The first element was not challenged. The learned magistrate did not need to deal with the second element as that was a purely legal question and had been dealt with by the High Court. Nevertheless, she had considered the issue and concluded correctly that P8 and P9 were affidavits which the court (or any public servant or other person for that matter) was bound or authorized to receive as evidence, in this case, that she is not Sharma Kumari Shukla. D

The second element was dealt with above. E

The third element was not disputed. With regard to the fourth, fifth and sixth elements, I have had the benefit of reading the thorough judgment of Augustine Paul J in *Sharma Kumari*'s case. Suffice it to say that I agree entirely with his Lordship's reasoning and conclusions.

The fourth element is that the statement was false. As dealt with in the judgment of *Sharma Kumari*'s case, a statement that her name is not Sharma Kumari Shukla is false because she has in fact been known as Sharma Kumari Shukla. That she is also known as Sharma Kumari a/p Oam Parkash or simply Sharma Kumari does not preclude her from being known also as Sharma Kumari Shukla. Nothing in the defence evidence affects this conclusion and in fact strengthened it. F G

The fifth element is that it must touch a point material to the object of the declaration. In this case, as mentioned earlier above, the affidavits had more than one object. One of the objects is to reserve, as a matter to object upon, the defence set out in para (1) of the statement of defence. Again nothing in the defence evidence served to raise a reasonable doubt on this issue. H

As to the sixth element, the appellant was making a statement in respect of a matter she knew directly. She had acknowledged and used the name Sharma Kumari Shukla as her name. For that knowledge she was not relying upon the opinion or advice of others because it is in respect of her own name. The inference is that she knew that the statement that Sharma Kumari Shukla was not her name was not true. It is therefore a deliberate false statement. I

A The defence evidence acknowledged Shukla is her family name, and that she had used the name Sharma K Shukla also. The fact that her name in her identity card is Sharma Kumari a/p Oam Parkash is irrelevant to the issue whether she is Sharma Kumari Shukla. There is nothing to contradict that she had not been known as Sharma Kumari Shukla. Her evidence that her intention is to say that her official or formal name as in her identity card
B is contradicted by the plain and obvious meaning of the words in para (2) of P8 and P9, in both the original affidavit (in Bahasa Malaysia) and the English translation provided with it. Even if other documents filed by her are taken into consideration to assist in eliciting the meaning and intention of para (2) in P8 and P9, it is clear from the sequence from the
C memorandum of appearance, statement of defence, affidavit supporting the O 18 r 19 application, P8, the affidavit verifying documents and finally P9, that:

(1) If the conditional appearance acknowledged the name Sharma Kumari Shukla, the statement of defence proceeded to deny it and made it a ground of defence.

D

(2) If the affidavit supporting her O 18 r 19 application acknowledged she was the defendant but 'salah dihuraikan', ie suggesting her name was wrongly set out, that concession was dispelled by para (2) of P8, which said she was not Sharma Kumari Shukla and reserved the right to object on that ground, and clearly maintained the defence in para (1)
E of her statement of defence.

(3) If the affidavit verifying documents (P46) acknowledged that she was the defendant but not as named in the suit, that was soon dispelled by para (2) of P9, which said she was not Sharma Kumari Shukla and reserved the right to object on that ground, and clearly maintained the
F defence in para (1) of her statement of defence.

In other words, her evidence that her intention is to say that her official or formal name as in her identity card is contradicted by her documents when seen in the sequence they were presented. P39 and P46 show she could make that intention clear, but elected to make the statements in para (2) of
G P8 and P9 to say she was not Sharma Kumari Shukla and specifically reserved the right to object on that ground. That para (2) was not inadvertent is shown by the fact that it is wholly consistent with the first paragraph of her statement of defence, and completely demolishes the submission that para (2) is capable of the alternative interpretation that is supported by her testimony of her innocent intention.

H While the task of an appellate court may well have been much easier if the learned magistrate had written a longer judgment, I am satisfied from the judgment of the learned magistrate that it is sufficiently explanatory in the circumstances of the nature of the defence evidence adduced, and that her findings are in accordance with the law. As detailed at length above, there is nothing in the evidence that is contrary to her finding as to suggest
I she had not considered all of the evidence before making her conclusions. I therefore confirmed her decision and dismissed the appeal against conviction.

Sentence

The appellant was sentenced to a term of imprisonment of three years for each charge, effective from the date of sentencing. She has appealed against sentence on the following grounds:

(t) the learned magistrate had pronounced a manifestly excessive sentence against the appellant which failed to consider all the mitigating factors advanced in her behalf.

(u) the learned magistrate passed a sentence that is manifestly excessive when considered with other comparable cases.

Sentencing is always the prerogative of the sentencing judge or magistrate: *New Tuck Shen v PP* [1982] 1 MLJ 27; *PP v Chew Ah Hock* [1956] MLJ 67. It is therefore a well established rule that an appellate court interferes with a sentence only if it is wrong in law, or is manifestly inadequate or excessive: *Tan Soo Har v PP* [1975] 2 MLJ 32 (FC); *Leong Ka Kong v PP* [1976] 2 MLJ 21; *PP v Loo Choon Fatt* [1976] 2 MLJ 256; *PP v Jafa bin Daud* [1981] 1 MLJ 415; *PP v Sulaiman bin Ahmad* [1993] 1 MLJ 74; *Wong Kim Leng v PP* [1997] 2 MLJ 97; *PP v Govindnan a/l Chinden Nair* [1998] 2 MLJ 181; *Christopher Khoo Ewe Chenq v PP* [1998] 3 MLJ 881 (CA); *Kesavan Senderan v PP* [1999] 1 CLJ 343; *Lim Guan Eng v PP* [1998] 3 MLJ 14, [1998] 3 CLJ 769 (CA) and *Teo Chin Hwa v PP* [2000] 1 MLJ 687 (CA).

In respect of the first ground on sentence, the submissions advanced in respect of mitigation of sentence before the learned magistrate is as follows:

Mitigasi:

OKT is 40 years old and she's not working. She has three children, the youngest is 19 months who is under her custody and care. The youngest child can't stay without her.

She is remorseful. She's submitting to the mercy of this court for a lenient sentence. That's it.

Kulasegaran:

In this case, throughout, there is none at all any aggravating factor. That's all.

Submission with regard to mitigation left much to be desired. The learned magistrate did not have much assistance. Indeed I might add at this juncture that before me, counsel mentioned the appellant has two children. Upon this court seeking clarification, only then it was confirmed with the appellant that she has two children.

Nevertheless the learned magistrate correctly recognized the thrust of the mitigation advanced: personal factors. At the top of p 11 of her judgment, the learned magistrate said:

Walau bagaimanapun, ini merupakan faktor peribadi dan tidak seharusnya diberi penekanan yang amat berat sebagai mitigasi kepada hukuman yang dikenakan.

This is perfectly in accord with the accepted approach set out in *Loo Choon Fatt*'s case, where Hashim Yeop A Sani J (later CJ (Malaya)) expressed the

correct psychological approach to sentencing with admirable clarity as follows (at pp 257–258):

> Presidents and magistrates are often inclined quite naturally to be over sympathetic to the accused. This is a normal psychological reaction to the situation in which the lonely accused is seen facing an array of witnesses with authority. The mitigation submitted by a convicted person will also normally bring up problems of family hardship and the other usual problems of living. In such a situation the courts might perhaps find it difficult to decide as to what sentence should be imposed so that the convicted person may not be further burdened with additional hardship. This in my view is a wrong approach. The correct approach is to strike a balance, as far as possible, between the interests of the public and the interests of the accused. Lord Goddard LCJ in *Rex v Grondkowski* [1946] 1 All ER 560, at p 561 offered some good advice when he said:
>
> > 'The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of the prisoners.'

While the term 'mitigating factors' is generally employed, it must be recognized there are principally two categories of mitigating factors. The first relates to those factors that make the particular offence committed by the person found guilty of it, less serious than other similar cases. This category of mitigation has a direct and important effect on the sentence, and appeals to our sense of justice and fairness. The second relates to those factors that essentially fall into the humanitarian category, and principally appeals to our tolerance, sympathy and mercy. A recognition of the distinction offers some assistance in coming to an appropriate balance.

Mr Athimulan for the appellant submitted before the learned magistrate that the court can consider sentences passed in other cases. He submitted that in one *DP Vijandran*'s case, the accused, an advocate and solicitor was sentenced to one month's imprisonment and a fine of RM2,000 by the Sessions Court and this was upheld by the High Court. Before this court, Mr Kumaraendran similarly relied upon *DP Vijandran*'s case as to sentence. I regret that counsel, by failing to do so, makes it incumbent upon me to mention that DP Vijandran was acquitted, his conviction quashed and sentence set aside by the Court of Appeal in *DP Vijandran v PP* [1999] 1 MLJ 385.

Nevertheless, our sense of justice and fairness requires that like offences be treated alike. While uniformity is desired, the courts have always been painfully aware that cases are not always alike except superficially. The sentence mandated by statutory provisions, the prevalence of such offences, the mitigating factors tending to show that the particular offence is not so serious, or lack of the element of being deliberate or contumacious, remorsefulness and humanitarian reasons are some of the matters that affect the actual sentence passed. In the interest of justice and fairness to all, the courts actively consider these grounds even though it is difficult to calculate and demonstrate mathematically, in preference to a standard sentence regardless of the particular factors of each case. To assist the court in that task, it is incumbent upon counsel of an accused person to advance his

mitigation for consideration. I hesitate to say that a sentencing judge is wrong if he fails to consider a factor in sentencing which was not brought up in mitigation, but is alluded to in the defence during trial, for the reason that it may well have been rejected by the court in convicting the accused. For example, it is argued in this appeal that the learned magistrate failed to consider that the counsel had conceded she was Sharma Kumari Shukla in the civil trial. That point was not raised in the mitigation plea, although it was in evidence in the trial. If it was raised, it would be found quickly that that concession by counsel was made in the course of trial and after the complaint has been made in criminal proceedings.

Despite the inherent difficulty of demonstrating exactly how a sentence is arrived at, it is not something that is picked out of thin air. There is a systematic way to approach sentencing: (a) the starting point based upon the public interest; (b) the aggravating and mitigating factors; and (c) discount for a plea of guilty.

The offence under s 193 of the Penal Code attracts a term of imprisonment of up to seven years and shall also be liable to a fine. The section reflects the serious view taken by the law in respect of making false evidence. Any modern system of justice relies upon the evidence placed before it to make its findings of fact. It cannot be denied that a fair and just decision involves the application of law to the facts found to be proven to the requisite standard of proof. Now, the accepted way of proof is by way of placing the evidence before the court by way of oral testimony or, in civil cases, also by affidavits. Oral testimony or affidavits are taken on the basis of an oath or affirmation that the maker will tell the truth and nothing but the truth as to the facts that the maker perceived by any of his five senses. Their opinions, except the opinions of acknowledged experts, are irrelevant. Torture and interrogation cannot ensure the maker tells the truth. Indeed no reliance can be placed upon any testimony obtained by such abhorrent means. Neither can extraction and examination of the heart or brain verify if he is telling the truth. This only serves to emphasize that courts rely upon witnesses and deponents to tell the truth. The system of justice will collapse if witnesses and deponents feel free to give false evidence or testimony (see *Bhandulananda Jayatilake v PP* [1982] 1 MLJ 83 (FC)). Such acts are nothing but a contempt of our peers and of the administration of justice and is wholly contrary to the public interest. The making or giving of false evidence, if proven, must therefore be dealt with, with the clear objective of deterrence, not only of that individual from repetition, but also to deter others. To wait until such offences are rampant like drugs and traffic cases before taking strict action will put the administration of justice in jeopardy. Any risk of the court acting upon false evidence is unacceptable since it results in injustice. Any system of administration of justice that tolerates false statements in affidavits risks ridicule.

Taking these factors into consideration, the starting point with regard to a sentence relating to an offence that affects the administration of justice so directly must start at about one-half to two-thirds of the maximum penalty.

There are no real mitigating factors in this case relating directly to the offence once the defence, which relies entirely upon lack of mens rea is rejected. The humanitarian reasons is overshadowed by the clear deliberateness of the offence in this case. It is clear that the appellant accepted that her name is Sharma Kumari Shukla, as is evident from her unconditional appearance. In her affidavit of 19 June 1998 (exh P39), she backtracked from the unconditional terms, saying that her name 'telah salah dihuraikan'. In P8 and P9 she said she was not the person described as the defendant. At the time of the making of the affidavits P8 and P9 she reserved the right to object on those grounds. That ultimately she did not object on the ground is immaterial as far as the offence is concerned, and in the proceedings she conceded through counsel she was also known as Sharma Kumari Shukla only reduces the ultimate seriousness of her offence. On the other hand, in reserving the right to object on that ground it required the other party to incur the inconvenience of preparing to prove if necessary she was also known as Sharma Kumari Shukla.

I have noted that her defence was that she was trying to correct what she said is an error in her name in that Civil Suit No S2–22–594–99. The learned magistrate is right in her conclusion that para (2) of PB and P9 contradicts the defence. In those paragraphs she said she was not the 'person'. She did not say the name Sharma Kumari Shukla was not her name as registered with the National Registration Department and appearing on her identity card. In her affidavits P8 and P9 with the title using the name as in the action 'Sharma Kumari Shukla', and the opening words showing her name 'Sharma Kumari a/p Oam Parkash' and her identity card number, the statement in para (2) that she is not the 'person' described as the defendant and reserving the right to object on that ground, imports a meaning well beyond pointing out that her name in her identity card is Sharma Kumari a/p Oam Parkash. It is obvious that at the time P8 and P9 were made, she was reserving the right to rely on the plaintiff Dato Abdullah Hishan bin Hj Mohd Hashim's reliance upon the name 'Sharma Kumari Shukla' as a route of objection and is a cool and calculated move for a possible escape from the judgment. It is a vile and vicious kind of act suggesting a willingness to achieve objectives by any means, however unscrupulous it may be.

False statements in sworn testimony, unless acted against firmly, would muddy the administration of justice. It is conduct such as this by litigants which will bring justice to a grinding halt. A court of law must express it utmost contempt and rejection for such actions that defile justice at its doorsteps. By the same token the court commends the complainant, Dato Abdullah Hishan for his courage to stand up and complain, so that with investigation and successful prosecution the system of justice may be purged of such acts. If truth and a commitment to truth prevails amongst litigants and witnesses it is easier for the courts to deliver on its duty to achieve justice. Where litigants and witnesses feel free to say what they like through a semblance of truth only, it becomes difficult to identify truth. The danger of acting upon an untruth, and causing injustice to another increases.

She was fully aware at that time that she was known to the plaintiff and others by the name 'Sharma Kumari Shukla' as evidenced by the letter of offer by the plaintiff as Chief Executive Officer of Glamour World of Sports (P1), Insas Bhd (D28), memo pads signed by the appellant herself used while working for Dato Abdullah Hishan bin Hj Mohd Hashim which carried the legend 'from the desk of Sharma Kumari Shukla' and salary voucher for herself (P7) which she signed 'Sharma Kumari Shukla' as the person approving and receiving it. These exhibits show she had held herself out as Sharma Kumari Shukla long before she affirmed those affidavits. In the circumstances, the denial as in P8 and P9 is bold and brazen deception. It shows a high degree of deliberation on her part to thwart the administration of justice. She was, on the face of P8 and P9 where the offences were committed, denying a name she had accepted and used, and therefore knew to be the truth for a long time.

It was submitted that in P46 she said she was the defendant, but a close inspection of the document shows that she actually deposed 'nama saya bukan seperti di atas', which literally meant saying her name was not Sharma Kumari or Sharma Kumari a/p Oam Parkash. When this was pointed out in the submission by the learned deputy public prosecutor, counsel hastened to explain it is a typographical error. Her explanation, relying on P46(a) that she was not denying she was the defendant, after filing an unconditional appearance and relying upon an affidavit bearing the name in the title Sharma Kumari which she now says is a typographical error bespeaks a facetious approach that is unacceptable in the administration of justice with regard to sworn evidence. Maintaining these grounds in mitigation after the same grounds have been rejected in her defence in the appeal against conviction displays a contumaciousness stressed by the fact no reference to remorse or contrition was made in the appeal before this court.

Even accepting that these aggravating factors do not outweigh the mitigating factors, the fact remains that the mitigating factors themselves in this case do not outweigh the aggravating factors that include a previous conviction, and on balance cannot contribute to any substantial reduction of sentence. Even adopting the lower starting point as explained above, the term of imprisonment would be $3^1/_2$ years. The sentence of three years imprisonment by the learned magistrate cannot be said to be manifestly inadequate, and certainly not manifestly excessive in the circumstances.

Appeal against sentence dismissed. Sentence by the magistrate's court confirmed.

Appeal dismissed.

Reported by Jafisah Jaafar